

Domestic Relations--Adultery as a Ground for Separation

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accompanied by a proposed pleading which is to set forth the claim or defense for which the intervention is sought.

The present section on intervention is preferable to the previous section which formerly required an "interest" in the "subject" of the action. The present provision is more definite in its requirements and will not be subject to conflicting interpretations as to whether such interest must be "direct" or "indirect."

It is apparent from the foregoing discussion of the new amendments that they will do much to clarify and facilitate methods of procedure in the New York courts.

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DOMESTIC RELATIONS—ADULTERY AS A GROUND FOR SEPARATION.—The Civil Practice Act has been amended to allow a spouse to maintain an action for separation from bed and board on the ground of an act of adultery of the other spouse.¹

Prior to the amendment the innocent party was entitled to a separation upon proving one of four grounds, to wit: abandonment, conduct of the defendant rendering it unsafe or improper for plaintiff to continue to cohabit with the defendant, neglect or refusal of the husband to support the wife and cruel and inhuman treatment.² When adultery constituted legal cruelty it was cause for a judicial separation. Thus it was held, ". . . if the adultery is open and notorious, flaunted in the eyes of the public or dragged into the presence of the blameless wife or husband, two wrongs arise out of the act: the adultery itself which is so gross an offense against the marriage as in itself to lead to a dissolution of the marriage, and cruelty. . . ." ³ Clandestine adultery was not sufficient justification for the separation; ⁴ adultery in and of itself did not constitute cruel and inhuman treatment.⁵ There was thus created the somewhat anomalous situation that a wrongful act greater in degree could not be the ground for relief lesser in extent. With the addition of sub-

¹ N. Y. CIV. PRAC. ACT § 1161, amended by Ch. 774 of the Laws of 1947, effective April 10, 1947.

² Old N. Y. CIV. PRAC. ACT § 1161.

³ Hofmann v. Hofmann, 232 N. Y. 215, 218, 133 N. E. 450, 451 (1921); Jacobstein v. Jacobstein, 201 N. Y. Supp. 1, 3 (Sup. Ct. 1923), *aff'd without opinion*, 240 N. Y. 693, 148 N. E. 761 (1925); *accord*, Goldsmith v. Goldsmith, 151 Misc. 198, 199, 270 N. Y. Supp. 48, 49 (Sup. Ct. 1934).

⁴ Compare Hofmann v. Hofmann, 232 N. Y. 215, 133 N. E. 450 (1921), with McKee v. McKee, 241 App. Div. 149, 271 N. Y. Supp. 384 (1st Dep't 1934).

⁵ See Lanyon Detective Agency, Inc. v. Cochrane, 240 N. Y. 274, 278, 148 N. E. 520, 521 (1925).

division five⁶ it is now possible to obtain a divorce, be it *a mensa et thoro* or *a vinculo matrimonii*, if one spouse is guilty of adultery and the other is without fault.

In an action for absolute divorce,⁷ although the adultery be proved, the divorce will be denied if the defendant can establish in recrimination the plaintiff's connivance, condonation, failure to institute the action within the requisite five years after the discovery of the adultery or if the defendant successfully raises the defense of the adultery of the plaintiff.⁸ The legislature has incorporated into Section 1161 like defenses to the action for separation based on adultery.⁹ These exceptions to the successful prosecution of the action for the partial dissolution of the marital status pose some new problems.

One of the questions presented is, whether the defenses as enumerated in the statute are the exclusive defenses to the separation action brought on the ground of adultery, or is the defendant able to interpose as a countercharge and thereby defeat the plaintiff's cause of action any of the grounds for separation which are, manifestly, less reprehensible in the eyes of the public, but which would, nevertheless, but for the defendant's own misconduct result in a separation decree for such defendant?

The defense of recrimination is an ancient principle.¹⁰ Its common law origins are variously explained;¹¹ generally, however, it is supported on the ground that since both spouses are guilty of misconduct neither is entitled to the aid of the court of equity.¹² Section 1163¹³ is the statutory embodiment of the common law doctrine of recrimination. It provides that, "the defendant in an action for separation from bed and board may set up, in justification, the misconduct of the plaintiff." The courts in construing this statute have not attempted to equate the wrongful conduct of the parties but have denied relief to either, where husband and wife have been guilty of misconduct. Thus, where wife charged abandonment the husband's counterclaim of adultery was held sufficient to offset her claim;¹⁴

⁶ N. Y. CIV. PRAC. ACT § 1161.

⁷ N. Y. CIV. PRAC. ACT § 1147.

⁸ N. Y. CIV. PRAC. ACT § 1153.

⁹ N. Y. CIV. PRAC. ACT § 1161, subd. 5, ". . . except where such offense is committed by the procurement or with the connivance of the plaintiff or where there is voluntary cohabitation of the parties with the knowledge of the offense or where action was not commenced within five years after the discovery by the plaintiff of the offense charged or where the plaintiff has also been guilty of adultery under such circumstances that the defendant would have been entitled, if innocent, to a divorce."

¹⁰ Note, 29 MICH. L. REV. 232 (1930).

¹¹ Note, 26 COL. L. REV. 83 (1926).

¹² *Blankenship v. Blankenship*, 51 Nev. 356, 276 Pac. 9 (1929); *Hawkins v. Hawkins*, 193 N. Y. 409, 413, 86 N. E. 468, 470 (1908).

¹³ N. Y. CIV. PRAC. ACT § 1163.

¹⁴ *Hawkins v. Hawkins*, 193 N. Y. 409, 411, 86 N. E. 468, 469 (1908).

where wife brought action against her husband on the ground that it was unsafe and improper for her to continue to cohabit with him and husband recriminated with charges of adultery both were denied relief;¹⁵ where wife sued for separation on the ground of cruelty the husband's countercharge of abandonment was sustained.¹⁶ It would seem improbable that the legislature intended the new ground for separation to be excluded from the purview of Section 1163. A contrary view would, in effect, be the adoption by inadvertence of the doctrine of comparative rectitude. That doctrine permits relief to the party less at fault.¹⁷ This doctrine has been adopted by but few jurisdictions.¹⁸

It is submitted that Section 1163 applies equally to all the grounds for separation as set forth in Section 1161; that any wrongful conduct which will justify the decree of separation will be a defense and a bar to the action for separation.

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¹⁵ *Kamman v. Kamman*, 167 App. Div. 423, 153 N. Y. Supp. 1122 (4th Dep't 1915).

¹⁶ *McKee v. McKee*, 241 App. Div. 149, 271 N. Y. Supp. 384 (1st Dep't 1934).

¹⁷ *Blankenship v. Blankenship*, 51 Nev. 356, 276 Pac. 9 (1929).

¹⁸ See Note, 63 A. L. R. 1132 (1929).